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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GEORGE LOMBARDI, et al.,
Petitioners,

VS.

HARVEY LUCIOUS HALL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JEREMIAH W. (JAY) NIXON
Attorney General

JOHN R. MUNICH
Chief Counsel, Litigation Division

BRUCE FARMER
Assistant Attorney General

ROBERT PRESSON
Assistant Attorney General
(Counsel of Record)

6th Floor, Broadway Building
Post Office Box 899
Jefferson City, Missouri 65102-0899
(314) 751-3321

Attorneys for Petitioners

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Do prison regulations outlining criteria for the appropriateness of release of an inmate from a restricted custody unit ("significant period of continuing and more responsible behavior") create a liberty interest on behalf of the inmate under the principles enunciated in *Hewitt v. Helms* and *Kentucky Dept. of Corrections v. Thompson*?

2. Should *Hewitt v. Helms* be reconsidered because the test enunciated therein (1) has led to inconsistent and unpredictable results, (2) ignores whether, under *Paul v. Davis*, the interest asserted is actually protected by or enforceable under state law, (3) fails to accord the proper degree of deference to judgments of correctional officials pursuant to *Bell v. Wolfish*, and (4) operates as a disincentive for a state to establish substantive standards for administrative decisions?

3. Whether prison officials can be denied qualified immunity when their conduct complied with a district court holding that was reversed by the appellate court subsequent to the conduct at issue?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, George Lombardi, Bill Armontrout, and Donald Cline, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 996 F.2d 954 and is reprinted as Appendix A in the Appendix to this petition. The opinion of the District Court is unreported and is reprinted as Appendix B in the Appendix.

JURISDICTION

The petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in

this case. The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 2202.

The opinion of the Court of Appeals was entered on June 29, 1993. Rehearing and rehearing en banc was denied on August 11, 1993. On November 1, 1993, petitioners were granted an extension of time until November 29, 1993 in which to file their petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The relevant constitutional provision involved in this case is § 1 of the Fourteenth Amendment to the United States Constitution which provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 217.335, RSMo 1991 Supp.

Section 217.340, RSMo 1986.

Section 217.375, RSMo 1991 Supp.

Regulation 20-212.040(7)(B) and (11).

The pertinent text of each statute and regulation is set forth in Appendix D pursuant to Rule 14.1(f) of the Supreme Court Rules.

STATEMENT OF THE CASE

This case arises out of a civil rights action commenced by the respondent, an inmate confined by the Missouri Department of Corrections, against three officials of the Department. George Lombardi is the Director of the Division of Adult Institutions of the Missouri Department of Corrections. Bill Armontrout was, at the time, Warden of the Jefferson City Correctional Center (JCCC). JCCC is a maximum security correctional facility operated by the Department of Corrections. Donald Cline was the Superintendent of the Special Management Facility (SMF). At the time, SMF was administratively a separate facility within JCCC. SMF operated as an administrative segregation facility providing Missouri's highest level of security in its correctional system. Within SMF there are three different levels of security.

On June 17, 1987, the respondent received a conduct violation for possession of dangerous contraband, i.e., two homemade knives. On June 23, 1987, the Special Management Facility Classification Committee recommended that respondent be assigned to level II of SMF. On September 16, the date of respondent's initial 90 day review, the classification team recommended that respondent be transferred to level III of SMF with protective custody status. On December 15, 1987, the date of the second 90 day review, the classification team recommended that respondent be released from SMF to the regular protective custody unit (PCU). This recommendation was approved by a subordinate of Mr. Cline's.

On December 13, 1987, the respondent wrote to Mr. Cline regarding his confinement at SMF and transfer therefrom. Mr. Cline's responded that institutions were crowded and moves were being made rather slowly at that time. On March 8, 1988, respondent again wrote to Mr. Cline expressing concern about when he would be transferred from SMF. Mr. Cline responded by stating that he presumed the move would be made in the not

too distant future but that all moves within SMF depended upon cell vacancies. Mr. Cline also stated that for administrative reasons some individuals were released prior to others at the top of the "list."

The classification team again reviewed respondent's confinement in SMF on March 14, 1988, June 13, 1988, September 12, 1988 and December 11, 1988. On each occasion, they recommended that respondent be transferred from SMF to PCU. On each occasion, the recommendation was approved by a functional unit manager. On December 4, 1988, respondent again wrote to Mr. Cline complaining that he had not been transferred from SMF. Mr. Cline responded that the institutions were at full capacity and would remain such until two new prisons (Potosi Correctional Center and Western Missouri Correctional Center) were opened.

On February 23, 1989, respondent received another conduct violation for possession of dangerous contraband, i.e., a home made ice pick. The SMF classification team recommended that he be placed at level I of SMF, the highest level of security. On March 29, 1989, the classification team recommended that respondent be transferred to level II of SMF. On June 21, 1989, the classification team stated in its summary and recommendation to "transfer to acceptable level." A functional unit manager again approved the recommendation. On August 1, 1989, respondent was issued a conduct violation for possession of an intoxicating substance. Respondent was assigned to 10 days in detention. In August 1989, prison officials reorganized SMF and many inmates that were once housed in that facility were transferred to the newly opened Potosi Correctional Center. Units 5A and 5B of the former SMF became regular protective custody cells and in August 1989, officials assigned respondent to unit 5A of the newly formed protective custody unit.

Prior to the August 1989 reorganization, the protective custody portion of SMF and the regular or general population PCU

were both single cell lock down units. The level of privileges regarding visitation, access to legal materials, religion and work assignments were similar for both units. The major distinction between these two protective custody units was that fewer corrections officers staffed PCU because its security level was not as high as SMF. Because of this difference in security, factors considered in determining whether an inmate should be transferred from the protective custody unit of SMF included previous escape attempts, the presence of enemies, and assaultive conduct violations. Respondent had received conduct violations not only for an escape in 1984 but also for assaults or aggressive behavior.

Respondent filed his pro se complaint on May 24, 1989, alleging a violation of his right to due process of law. On January 3, 1992, the petitioners filed a motion for summary judgment, based both on the merits as well as qualified immunity. The United States magistrate issued his report and recommendation on February 13, 1992, recommending denial of petitioners' motion. The magistrate found that while respondent had been afforded procedural due process, "the facts of this case suggest that the failure to release plaintiff from administrative segregation and retransfer him to protective custody was an arbitrary failure to restore the measure of liberty to which plaintiff was entitled — a substantive right." Specifically, the magistrate stated that:

> The records also indicate plaintiff was told he was not released because of overcrowded conditions. Nevertheless, other inmates who appear to have been approved for release subsequent to plaintiff were released prior to plaintiff. Defendants assert that a cell did not become available which met plaintiff's security needs, but do not state any steps were taken to find a suitable cell and do not state why the cells which became available were suitable for other protective custody inmates but not to plaintiff.

Appendix B, A-24 - A-25.

Petitioners filed exceptions to the magistrate's report and recommendation on February 24, 1992, and on June 11, 1992, the United States district court denied the petitioner's motion for summary judgment.

Petitioners filed a timely appeal to the United States Court of Appeals for the Eighth Circuit, and on June 29, 1993, a panel of the court affirmed the district court's order. In doing so, however, the court did not affirm the rationale of the district court because it found it unnecessary to decide whether substantive due process was violated by arbitrary and capricious action. Instead, the court concluded that the regulation in question created a liberty interest such that respondent had a legitimate expectation of being released within a reasonable amount of time following final approval of the recommendation and that the failure to do so violated a clearly established right preventing the petitioners from claiming qualified immunity. Petitioners filed a timely motion for rehearing or rehearing en banc and on August 11, 1993, the court denied rehearing. A copy of the court's order is attached hereto as Appendix C.

REASONS FOR GRANTING A WRIT

I. IN CONCLUDING THAT THE PRISON REGULATION IN THE INSTANT CASE CREATED A PROTECTABLE LIBERTY INTEREST, THE COURT OF APPEALS IGNORED OR FAILED TO PROPERLY APPLY THE PRINCIPLES ENUNCIATED BY THIS COURT IN *HEWITT V. HELMS* AND *KENTUCKY DEPT. OF CORRECTIONS V. THOMPSON.*

In *Hewitt v. Helms*, 459 U.S. 460 (1983), this Court clearly rejected the assertion that a change in an inmate's classification was, by itself, sufficient to invoke the procedural protections of the Due Process Clause of the Fourteenth Amendment. *See also Meachum v. Fano*, 427 U.S. 215, 225 (1976). This Court specifically noted that "transfer to less amenable and more restrictive quarters for non-punitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence" and that "[a]dministrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration." *Hewitt*, 459 U.S. at 468. However, although the due process clause by itself may not provide protection, this Court indicated that it was possible for state law to create liberty interests in the prison context that are subject to due process protection.

According to this Court, the most common manner in which a state creates liberty interests is the establishment of "substantive predicates" governing official decisions. *Id.* at 472. This Court clearly stated, however, that these predicates were "objective and defined criteria." *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). Moreover, the substantive criteria must also be coupled with mandatory language such that if the substantive predicates are present, a particular outcome must follow. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 463

(1989). The regulation considered by the court of appeals below does not establish objective criteria and does not mandate a specific outcome if any particular criteria are met. It fails to meet the test established by this Court and the court of appeals below incorrectly applied the principles of *Hewitt* and *Thompson*.

The portion of the regulation upon which the Eighth Circuit Court of Appeals focused states as follows:

> (11) RELEASE FROM SPECIAL MANAGEMENT FACILITY: Most inmates assigned to the Special Management Facility will work towards release from the facility to the general population. This will be accomplished by demonstrating progressively more positive and responsible behavior, as he is promoted through the level system.
>
> (A) Influencing factors: The primary performance objectives will be satisfactory work and training evaluations, demonstrated positive attitude and conduct, and meaningful participation in available self improvement activities.
>
> (B) Actual release: An inmate's release to the general population will be accomplished by being promoted from level I through level II to level III as a result of positive reviews by the Special Management Facility Classification Committee and the inmate's Unit Classification Treatment Team. A significant period of continuing and progressively more responsible behavior in level III will be required for the Special Management Facility Classification Committee to recommend and the Warden or designee to approve release to the general population.
>
> (C) Exceptions: There will be some inmates assigned to the Special Management Facility who do not become eligible for release to general population due to administrative reasons which may include security considerations, the inmate's personal safety, or other related correctional man-

> agement concerns. Such inmates may progress as far in the Special Management Facility level system as their particular circumstances will permit. Decisions in these cases will consist of specific directives from the Warden.

Appendix D, A-28 - A-29.

It is apparent from the face of this regulation that it does not meet the criteria so carefully laid out by this Court in *Hewitt*, *Olim*, and *Thompson*. First,[1] the criteria contained in this regulation are neither objective nor defined. The crucial terms "significant period" and "responsible behavior" are undefined. Indeed, one might have anticipated that the Eighth Circuit would have agreed that these criteria were insufficient based on its opinion in *Dace v. Mickelson*, 816 F.2d 1277 (8th Cir. banc 1987), considering whether a parole statute created a liberty interest. The court stated:

> Substantive standards are specific, objective, measurable criteria such as length of time served, prior criminal history, seriousness of the offense, any disciplinary reports, and the existence of any detainers filed against the inmate.... On the other hand, general factors to be taken into consideration by a parole board which do not rise to the level of substantive guidelines include general sociological and background information such as family history, education, progress in rehabilitation programs, and ability to adjust to life outside prison.

Id. at 1280. The criteria contained in the regulation in the instant case are not significantly different than the criteria the Eighth Circuit found insufficient in *Dace*.

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[1] Actually, the first issue may be whether the regulation, addressing return to general population, even applies to an inmate such as respondent being transferred to PCU, another segregation unit.

Second, the regulation in the instant case does not mandate a particular result upon the establishment of a particular substantive predicate. The regulation provides that *most* inmates will work towards release in the fashion set out in the regulation. It does not guarantee that all inmates will be released in that manner. In addition, subparagraph (C) specifically provides for exceptions "due to administrative reasons which *may* include security considerations, the inmate's personal safety, or *other* related correctional management concerns." (Emphasis added.) Management and security concerns become particularly relevant in the respondent's case in which the recommendation was not to release him to general population, but to reassign him to another protective custody unit in which the level of security would not be as great as SMF. In such a situation, the interest of the respondent would have to be balanced against the interests of other inmates and staff. Assignments to PCU come not only by reason of transfers from SMF, such as the respondent, but also from the general population of the institution. The safety and security of general population inmates who are seeking protective custody would be much more urgent than that of an individual such as the respondent who is already in a secure environment. A reasonable correctional official should be allowed to consider this in addition to more mundane factors such as available bed space.

The Eighth Circuit, however, concluded that subparagraph (C) of the foregoing regulation was inapplicable because it related only to an inmate's eligibility for release while the respondent's release had been approved. A recommendation could have been disapproved for the reasons listed in subparagraph (c). Thus, if the warden had disapproved the recommendation, there would evidently have been no violation of the respondent's constitutional rights. However, to approve the recommendation, but to delay the effectuation of the transfer for the same reasons is, in the Eighth Circuit's opinion, a violation. Such a fine distinction is not of constitutional import. A reasonable official

viewing this regulation could conclude that he had the authority to determine when a transfer from one restrictive unit to another is consistent with the security and management needs of his institution.

Such a belief by a correctional official would be consistent with this Court's opinion in *Thompson*, 490 U.S. 454. In that case, the Kentucky regulation established certain grounds for excluding visitors to the prison. The regulation did not require that visitors be excluded if those grounds were established. Further, a procedures memorandum stated that administrative staff reserve the right to allow or disallow visits. Similarly, in the instant case, the regulation reserves the right to take into account security, an inmate's personal safety or other correctional management concerns in deciding when an inmate should be transferred from SMF. This regulation simply lacks the mandatory element which this Court has indicated is essential to the creation of a liberty interest.

The Eighth Circuit opinion actually bypasses most of the foregoing analysis. Its primary focus is the failure to transfer the respondent. However, the latter cannot be viewed in isolation. The existence of mandatory procedures alone is insufficient to establish a liberty interest. *Hewitt v. Helms*, 459 U.S. at 471. In addition, the failure to follow a state statute does not constitute a violation of the due process clause. *Brown v. Frey*, 889 F.2d 159, 166 (8th Cir. 1989); *Weimer v. Amen*, 870 F.2d 1400, 1406 (8th Cir. 1989). Although petitioners do not believe they violated the regulation in question, the apparent belief of the Eighth Circuit that they did is irrelevant unless the regulation creates a liberty interest under the principles enunciated by this Court in *Hewitt* and *Thompson*. Because the regulation does not meet the test established in those cases, the Eighth Circuit plainly erred in affirming the denial of petitioners' motion for summary judgment. The Eighth Circuit's departure from established

principles is so plain and inexplicable that this Court should grant a writ of certiorari to review its decision.

II. THE TEST ENUNCIATED BY THIS COURT IN *HEWITT V. HELMS* AND *KENTUCKY DEPT. OF CORRECTIONS V. THOMPSON*, SHOULD BE RECONSIDERED BECAUSE (1) IN PRACTICE, IT HAS PROVEN TO BE SO INCONSISTENT AS TO BE UNWORKABLE, (2) AS A THEORETICAL MATTER, IT HAS OBSCURED RATHER THAN ILLUMINATED WHAT THIS COURT IDENTIFIED IN *PAUL V. DAVIS* AS THE ULTIMATE QUESTION TO BE ADDRESSED IN DETERMINING WHETHER A STATE HAS CREATED A LIBERTY OR PROPERTY INTEREST, AND (3) AS A POLICY MATTER, THE TEST PROMOTES A LACK OF STANDARDS BY STATE AND LOCAL GOVERNMENTS SINCE IT IS ONLY IN THE ABSENCE OF ALL STANDARDS THAT A STATE OR LOCAL GOVERNMENT HAS ANY ASSURANCE THAT IT HAS NOT CREATED A LIBERTY OR PROPERTY INTEREST.

Although clearly erroneous under existing standards, the Court of Appeals' decision, is symptomatic of a much larger problem. The test established by this Court in *Hewitt* and *Thompson* was no doubt created for the purpose of providing guidance to lower courts in applying the due process clause and to state officials in assessing the impact of various state actions but the result has been to provide guidance to neither group. The outcomes have been simply too inconsistent and unpredictable. *See United States v. Dixon*, 113 S.Ct. 2849 (1993) (prior decision overruled in part, because it produced confusion). The unpredictability has, in turn, effectively deprived state officials of the benefits of qualified immunity such as in the instant case. In addition, the concentration upon the existence or nonexist-

ence of criteria and the mandatoriness thereof has obscured from any consideration the question of wether the asserted liberty or property interest is actually a right protected by and enforceable under state law. *Paul v. Davis*, 424 U.S. 693, 711 (1976). As a consequence, the test enunciated by this Court provides a positive incentive for states to avoid establishing any criteria for state action.

A. Inconsistency of Results.

The matter of inconsistency of result has been briefly touched upon above. The decision rendered by the Eighth Circuit in the instant case would appear to be inconsistent with its prior opinion in *Dace v. Mickelson, supra*, on the question of whether the criteria are sufficiently objective and defined. The result in the instant case is also inconsistent with another Eighth Circuit decision in *Patten v. North Dakota Parole Bd.*, 783 F.2d 140, 142 (8th Cir. 1986), in which the court held that the conditions for parole ("a good record . . . for a reasonable period") were not sufficiently particularized to create a liberty interest.

On the other hand, in *Knight v. Armontrout*, 878 F.2d 1093 (8th Cir. 1989), the Eighth Circuit held, on the basis of the same regulation as the instant case, that the decision to assign an inmate to administrative segregation involved a liberty interest. However, the court reached that conclusion in a single conclusory paragraph that did not identify, much less analyze, the particular language which accomplished that result. With regard to assignments to administrative segregation, the regulation provides:

> (B) Permanent Assignments: The Special Management Facility Classification Committee shall recommend whether an inmate should be classified to the Special Management Facility. In making such arrangements and recommendations, the Classification Committee shall consider the immediate conduct and prior behavioral history of the inmate,

> as well as any other salient reasons for initial placement in administrative segregation (material witness, etc.). . . .
>
> All Special Management Facility Classification committee assignment recommendations will be reviewed and approved or modified by the Deputy Warden.

Appendix D, A-28. The existence of any objective defined criteria, much less any mandatory directives, are not immediately apparent. The Eighth Circuit never explained why it believed there was a liberty interest involved.

The situation regarding administrative segregation is even more confusing when one considers the Eighth Circuit's opinions in *Williams v. Armontrout*, 852 F.2d 377 (8th Cir. 1988) and *Sanders v. Woodruff*, 908 F.2d 310 (8th Cir. 1990). In these cases, the court concluded that classification decisions regarding movement among the various levels in SMF did not implicate a liberty interest. However, the movement between levels of security in SMF is dependent upon "progressively more positive and responsible behavior." This does not differ in any significant regard from the provision regarding transfer from SMF. In terms of rational policy-making, the petitioners have been given no guidance as to what it is they did or did not do that prompted those results.

The Eighth Circuit is not alone is struggling with this issue. In *Sheley v. Dugger*, 833 F.2d 1420 (11th Cir. 1987), the court found that a Florida regulation regarding placement in administrative confinement created a liberty interest. According to the court, the regulation permitted confinement only

> if "disciplinary charges or criminal charges" are pending against the inmate and the "presence of the inmate in the general population would present a clear danger;" if an "investigation is pending and the presence of the inmate" would create a risk because of medical (including psychi-

> atric) reasons; or if the "facts clearly indicate that the inmate must be removed from the general inmate population for the safety of any [persons] or for the security of the institution."

Id. at 1424.

On the other hand, in *Chandler v. Baird*, 926 F.2d 1057 (11th Cir. 1991), the same court held that a similar section of the Florida administrative code governing county and municipal detention facilities did not create a liberty interest. This rule in part provided:

> Inmates may be placed in administrative confinement for the purpose of ensuring immediate control and supervision when it is determined they constitute a threat to themselves, to others, or to the safety and security of the detention facility.

Id. at 1060. This, the court concluded, lacked the requisite mandatoriness.

In *Matthews v. Fairman*, 779 F.2d 409 (7th Cir. 1985), the court dealt with a regulation stating "A resident may, for inability or incompetence in completing a work, training or study assignment, upon the written recommendation of the staff supervisor, be removed from the assignment and reassigned by the assistant supervisor." *Id.* at 414. The court concluded that there was no liberty interest established by this regulation because it did not promise that reassignment would not occur absent specific substantive predicates and placed no limitation on the discretion to reassign inmates. In a later case, *Smith v. Shettle*, 946 F.2d 1250 (7th Cir. 1991), the court dealt with a statute permitting "administrative segregation if the prison 'first finds that segregation is necessary for the offender's own physical safety or the physical safety of others.'" In dicta, the court gave a strong indication that this would create a liberty interest.

> It also makes no difference either that the statute does not *require* but only permits segregation — most statutes leave discretion to the persons charged with their enforcement rather than commanding them to enforce the statute to the hilt . . . .

Id. at 1253. Thus, on the one hand, the Seventh Circuit has said that a statute or regulation providing that a certain action may be taken for certain reasons is not sufficiently mandatory, while at the same time issuing dicta that such a statute or regulation might create a liberty interest.

In the Third Circuit, there is the case of *Layton v. Beyer*, 953 F.2d 839 (3d Cir. 1992), in which the court held that the state had established explicit standards to be met before placing an inmate in restricted custody:

> An inmate may be temporarily confined to close or maximum administrative custody in an investigative status upon approval of the officer in charge of the institution where it has been determined that there is a threat of a serious disturbance, or a serious threat to the individual or others.

Id. at 845. Earlier, however, the Third Circuit had decided *Stephany v. Wagner*, 835 F.2d 497 (3d Cir. 1987), in which the relevant rule provided that administrative segregation may be considered when the security of the institution or the safety of individuals is threatened, upon the recommendation of a physician or mental health caseworker that it would be in the interest of the inmate, when an inmate engages in a behavior that is threatening to his or her life or health or when an inmate requests protective custody. The court concluded that the inmate did not have a liberty interest under this Court's opinion in *Hewitt*, apparently because the regulation did not contain any mandatory release provision as did the statute in *Hewitt*.

The foregoing cases illustrate the inconsistency and confusion which is the rule rather than the exception in this type of case.

This point has also been noticed by the lower courts. In *Huggins v. Isenbarger*, 798 F.2d 203, 206 (7th Cir. 1986), the court stated:

> We recognize that some decisions seem to look the other way, holding that just about any time a law or regulation gives parole officials a list of things to consider, it has established a liberty or property interest. E.g., *Parker v. Corrothers*, 750 F.2d 653 (8th Cir. 1984).

On the other hand, Judge Arnold of the Eighth Circuit in his dissent in *Dace v. Mickelson*, 816 F.2d at 1284 stated: "Only if a state does publish criteria and give certain assurances, the degree of specificity of which is not easy to define, will the protections of the Fourteenth Amendment come into play." Although disagreeing with the conclusion of Judge Arnold in his dissent, petitioners do agree with his assessment that the specificity required of regulations before they create a liberty interest is difficult to define.

The unpredictability of results often deprives officials of the benefit of the qualified immunity defense, as in the instant case. Prior to the instant case, the Eighth Circuit had held that assignment to SMF implicated a liberty interest, *Knight*, 878 F.2d 1093, but also held that movement of inmates between the three security levels of SMF did not. *Williams*, 852 F.2d 377 and *Sanders*, 908 F.2d 310. In the instant case, the Eighth Circuit failed to follow *Williams* and *Sanders* despite the fact that release or transfer from SMF may be characterized as the ultimate reclassification decision. Instead, the court drew a distinction between classification as to levels of SMF and the classification decision to transfer an inmate from SMF. Under the regulation, promotion through the levels of SMF depends upon "progressively more positive and responsible behavior." Release from SMF requires officials to consider whether an inmate has had a "significant period of continuing and progressively more responsible behavior." Petitioners fail to see a significant distinc-

tion. Yet according to the Eighth Circuit, the law was so clearly established that reasonable officials would have known respondent's rights were being violated.

The Eighth Circuit's qualified immunity analysis violates every principle set forth by this Court. The Eighth Circuit held that the holding in *Knight* deprived the petitioners herein of qualified immunity. The Eighth Circuit, however, acknowledged that *Knight* was not decided "until about the time [respondent] was released from the Special Management Facility." 996 F.2d at 957. Despite the fact that *Knight* was decided after the conduct at issue in this case, the Eighth Circuit nonetheless held that the "decision in *Knight* was predictable." 996 F.2d at 958. In *Knight*, however, the Eighth Circuit *reversed* the district court's holding that the regulation at issue did not create a liberty interest. 878 F.2d at 1095.

The Eighth Circuit has denied qualified immunity to prison officials whose conduct complied with a district court ruling that was not reversed until after the relevant decisions at issue in this case were made. Prison officials can hardly be held responsible and should not lose their qualified immunity because they failed to "predict" the Eighth Circuit would reverse existing law.

This court had repeatedly held that the qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341-43 (1986); *see also Hunter v. Bryant*, 112 S.Ct. 534, 537 (1991). The Eighth Circuit, in effect, penalizes prison officials for "mistakenly" relying on a district court's opinion that was only subsequently reversed. It is fundamentally unfair and legally impermissible to require prison officials to "guess at their peril" that existing case law would be reversed by the appellate court.

The principles of qualified immunity become a mockery if officials cannot rely on prior caselaw and are forced to anticipate wildly unpredictable decisions. As a result, petitioners submit that the *Hewitt* test has become essentially unworkable and should be reconsidered.

B. The Test Enunciated in *Hewitt v. Helms* and *Kentucky Dept. of Corrections v. Thompson* Diverts Attention From the Ultimate Issue, i.e., Whether There Exists a Right Recognized By The State And Protected By State Law.

Apart from its difficulty in application, the test of *Hewitt v. Helms* has little to do with what this Court had earlier identified as the principal area of inquiry in determining whether there was a state created liberty interest warranting due process protection. In *Paul v. Davis*, 424 U.S. 693, 711 (1976), this court enunciated that principle as follows:

> In each of these cases, as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished. It was this alteration, officially removing the interest from the recognition and protection previously afforded by the state, which was found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment.

The concept of what status or protection state law affords has not entirely vanished from analysis in these cases. As this court reiterated in *Thompson*, 490 U.S. at 465:

> Or, to state it differently, the regulations are not worded in such a way that an inmate could reasonably expect to enforce them against the prison officials.

However, the status under state law of the asserted liberty interest has diminished in importance. Further, the current test of substantive predicates and manditoriness does not directly address this important issue.

As this Court stated in *Olim v. Wakinekona*, 461 U.S. at 250-251, a state may require procedures for reasons other than to establish substantive rights. However, a state may similarly impose mandatory criteria for purposes other than the creation of substantive rights. This is particularly true the further removed the alleged source of the liberty interest is from purely statutory enactments. For instance, in *Clark v. Brewer*, 776 F.2d 226 (8th Cir. 1985), the court declined to hold that any particular statute created a liberty interest but instead relied upon department policies as embodied in an employee manual. Petitioners submit that internal rules, policies and employee manuals are primarily, if not exclusively, intended to provide guidance to the employees rather than creating entitlements in favor of nonemployees. "Statutes and regulations ... are efforts by the state to control the jailers, to reduce disparity among its agents, not to give prisoners legally enforceable entitlements." *Wallace v. Robinson*, 914 F.2d 869, 877 (7th Cir. 1990) (Easterbrook, J. concurring), vacated 922 F.2d 409, superseded 940 F.2d 243 (1991).

The heads of large government agencies obviously cannot participate in the making of every decision for which their departments may be responsible. For supervisory officials to exercise their authority, it is necessary for them to issue general directives in the forms of rules or manuals. These are intended for management purposes and not to make them legally binding upon the agency or its officials. These types of rules may channel decision-making authority to be exercised in a particular manner or within certain parameters. However, as the Seventh Circuit Court of Appeals explained in *Miller v. Henman*, 804 F.2d 421, 427 (7th Cir. 1986), a regulation which directed staff to exercise

professional judgment, "albeit within specific guidelines," did not create a liberty interest. *See also Russ v. Young*, 895 F.2d 1149, 1154 (7th Cir. 1990).

In addition, internal rules and policies cannot anticipate every situation that might arise. Officials may be called upon to address situations which are technically beyond the scope of the rules. It is unwarranted to assume in such circumstances that the officials are not authorized to act. A cautious official may seek permission from his superior before taking such action. When that is not possible, he may act as he deems best and whether he is answerable for any deviation from a rule or policy should be a matter of judgment for the official who actually promulgated the rule. That official may decide the deviation was warranted, in which case there would be no adverse consequences. If the official disagreed with the action taken, he may order corrective action and/or take some disciplinary action. This is an administrative judgment that primarily affects the relationship between one official and his subordinates.

This is illustrated in *Stein v. James*, 651 S.W.2d 624 (Mo.Ct.App. 1983), in which plaintiff sued on the basis of an alleged violation of an executive order from the governor. The court held that the executive order did not create a basis for a cause of action. Executive orders consisting of communications to subordinate officials ". . . cannot be considered more than a directive from the governor to his subordinates in the executive branch for the carrying out of their official duties" and the only available enforcement is through discipline by the governor. *Id.* at 628.

As this Court stated in *Hewitt*, 459 U.S. 460, the creation of mandatory procedures is a salutary development.

> Creation of procedural guidelines to channel the decision-making of prison officials is, in the view of many experts in the field, a salutary development. It would be ironic to hold

> that when a state embarks on such desirable experimentation it thereby opens the door to scrutiny by the federal courts, while states that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause.

Id. at 471. However, the development of substantive guidelines is equally salutary and a state should not be forced to run the risks and expenses of litigation by the fact that it does so. Similar concerns were expressed by the court in *Flechsig v. United States*, 991 F.2d 300 (6th Cir. 1993), in which the court held that the violation of a regulation of the Bureau of Prisons was not a basis for negligence per se.

> The Program Statement, however, is not a regulation from which negligence for a violation should arise per se. (Citation omitted). It is, instead, simply the Bureau's written statement of its internal operating procedures and thus insufficient to create per se liability whenever it is not followed. To hold otherwise would be to create a disincentive for the Bureau to have written procedures. An organization creates documents such as the program statement here as aspirational guidelines. To hold that failure to follow such guidelines creates potential Bureau liability would be to cause the Bureau to adopt as procedures only that which is legally required. The Bureau should not be discouraged, due to fears of increased liability, from promulgating guidelines which improve performance.

Id. at 304.

In *Stephany v. Wagner*, 835 F.2d at 502, the court held that under the applicable statutes and regulations, there was no liberty interest regarding confinement in administrative segregation. However, the court had some concerns over the result of that holding because it led

> to the disquieting result that prison officials could commit a prisoner . . . to administrative segregation for months without giving him a meaningful opportunity to correct what may be the erroneous factual basis upon which such commitment was based. We are bound, however, to leave correction of the situation to the state or prison authorities.

However, given the current state of the law, what incentive would the state or prison authorities have to modify the situation? The only truly safe haven that this Court has identified is when a state official can act for any reason "or for no reason at all." *Olim v. Wakinekona*, 461 U.S. at 249.[2] Surely a state or a reasonable correctional official should be able to make the judgment that it is desirable to have some standards without thereby running the risk of "scrutiny by the federal courts."

The problem with the current test is that the only choice seems to be between creating a liberty interest or no regulations at all. This arises from the fact that the current test focuses a court's attention on the content on the regulations and not their actual status under state law. Some courts have made a passing reference to this Court's opinion in *Hewitt v. Helms* as applying to regulations that have the force of law. *Layton v. Beyer*, 953 F.2d at 845; *Banks v. Fauver*, 801 F.2d 1422, 1424 (D. N.J. 1992). However, despite this reference, there appears to have been no actual consideration of what the force of a regulation might have been in the particular state. The test for whether the state has created a liberty or property interest should be reformulated to focus on the actual interest and its status under state law, i.e., is it enforceable? *See Perry v. Sinderman*, 408 U.S. 593, 602 n.7 (1972) (Texas law controlled whether non-tenured teacher

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[2] Actually, a total lack of standards may not be entirely safe either. It may be that the most broadly worded statutes or rules could be held void for vagueness. *Wolfel v. Morris*, 972 F.2d 712 (6th Cir. 1992); *Adams v. Gunnell*, 729 F.2d 362 (5th Cir. 1984).

had enforceable claim); *Wallace v. Robinson*, 914 F.2d at 878 ("If Illinois wants to do more than the Constitution requires yet falls short of the objectives it has set for itself, the error should be understood as a violation of state law, to be redressed through state agencies and courts.")

Statutes, as well as regulations, may only be aspirational and not intended to create any enforceable rights. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 18-20 (1981); *Flechsig*, 991 F.2d at 304. If there is no actual right that would be enforceable in a state court under state law, it is inconsistent to hold that there is a liberty or property interest that is subject to procedural protections mandated by the due process clause. This Court should return to the basic analysis contained in *Paul v. Davis*, and focus the inquiry on whether there is a particular right or status which is protected by and enforceable under state law.

C. Under Missouri Law, the Classification of and Internal Movements of Inmates Within the Department of Corrections Do Not Affect a Right or Status Protected By State Law.

In Missouri, the federal courts have too often concentrated on isolated statutory or regulatory provisions, ignoring the fact that they are part of a much larger system regarding the classification of thousands of inmates. Section 217.335, RSMo 1991 Supp., creates a classification team for each correctional institution. These classification teams are to make recommendations concerning an inmate's custodial care, work assignments, educational or vocational training and other treatment procedures. Prior to 1989, Section 217.340, RSMo 1986, provided that the superintendent shall classify inmates according to his job, cell, sleeping quarters and level of security "adhering as closely as possible to the recommendations of the classification team." Thus, the actual statutes of the State of Missouri made it clear that a superintendent is not bound by the recommendations of the

classification teams but did not spell out upon what basis he can make exceptions.[3] This is the sort of broad grant of authority which this Court has indicated would not create a liberty interest. However, the federal courts in Missouri have instead concentrated on particular administrative directives[4] which give some guidance to officials as to how to exercise this broad grant of authority. State case law would indicate that these do not create rights enforceable by state courts. As a general principle, agencies and officials of Missouri to whom a portion of the state's police power has been delegated, cannot surrender the right to exercise that power. *Handlan-Buck Co. v. State Highway Commission*, 315 S.W.2d 219, 223 (Mo. 1958); *State v. Anderson*, 242 S.W.2d 66, 71 (Mo. 1951).

State v. Brackman, 737 S.W.2d 516 (Mo.Ct.App. 1987) held that a transfer of an inmate between institutions was not subject to judicial review under Missouri's Administrative Code, Chapter 536, RSMo.

> Prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and maintain security, and are given broad administrative and discretionary authority over the institutions they manage.

Id. at 519. Interestingly, the state court afforded the deference to the judgment of corrections officials that this Court has applied

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[3] In 1989, § 217.340 was repealed, and § 217.335 was amended to provide that offenders should be assigned according to a department-wide assessment system. No statutory criteria was established. Thus, the discretion now rests in the Division Director rather than a facility superintendent.

[4] Statements concerning prison inmates are specifically excluded from the definition of a "rule" under Missouri's Administrative Code. Section 536.010(4)(K), RSMo 1986.

in the Eighth Amendment context. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). However, under *Hewitt v. Helms* and its progeny, there seems little room for any deference to such judgments. For instance, the opinion below deprived petitioners of the authority to interpret their own regulations and determine when the exceptions section applied. Instead, the focus seems to be on a microscopic search for ways in which to hold that officials have no discretion.

Other Missouri decisions reach results similar to *Brackman*. In *Parrish v. Wyrick*, 589 S.W.2d 74 (Mo.Ct.App. 1979), a prisoner sought a writ of habeas corpus based on his allegation that he had earned sufficient good time. At the time, Missouri had two separate forms of good time, statutory and regulatory. The court indicated that while the petitioner would be entitled to the benefit of the statutory good time, that would not authorize his release for another two years. The court held that the institutional good time was not enforceable. The dissent in that case suggested a quasi-contractual theory by which prison officials would be bound. This was specifically rejected by the majority.

> The foregoing objections make it unnecessary to deal at any length with a still further problem: that is, whether the philosophy of prisoner rights should be extended to a pronouncement that management and supervision of the state's correctional institutions are to be subjected to a concept of contractual relation between the inmates and the supervisory staff. Significantly, no existing authority has been cited so holding or even so suggesting.

Id. at 79. Thus, an inmate does not gain enforceable rights by virtue of institutional rules. In *Ex parte Rody*, 152 S.W.2d 657 (Mo. banc 1941), the court stated with regard to incentives given for good conduct:

> But the enforcement of these rules and laws, so far as they affect the reward is administrative, not judicial.

Id. at 660; *see also Ex parte Webb*, 30 S.W.2d 612 (Mo. banc 1929). The general principle enunciated by the Missouri Supreme Court in *McIntosh v. Haynes*, 545 S.W.2d 647, 652 (Mo. banc 1977), was:

> It should be clearly understood that penal and correctional institutions are under the control and responsibility of the executive branch of government, not the judicial branch, and that courts will not interfere with the conduct, management, and disciplinary control of this type of institution except in extreme cases.

The exception noted in that case was for conditions that allegedly violated the Eighth Amendment. It is clear, however, that in the absence of an explicit constitutional right such as the Eighth Amendment, Missouri courts have never interfered with the internal management of correctional facilities or recognized that inmates have enforceable rights under regulations promulgated for the operation of those facilities. The regulation at issue in this case does not establish a right that is enforceable in a Missouri court. If no Missouri court would review the internal classification of respondent, there is no state created interest warranting the application of the due process clause.

CONCLUSION

The petition for writ of certiorari should be granted either to (1) insure the uniform and consistent application of the test of *Hewitt v. Helms*, or (2) reconsider that decision to better reflect the principles of *Paul v. Davis*.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JOHN R. MUNICH
Chief Counsel, Litigation Division

BRUCE FARMER
Assistant Attorney General

ROBERT PRESSON
Assistant Attorney General

Post Office Box 899
Jefferson City, MO 65102-0899
314/751-3321

ATTORNEYS FOR PETITIONERS

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2543

Harvey Lucious Hall,

Plaintiff-Appellee,

v.

George Lombardi; William Armontrout, Warden; Donald Cline,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: March 18, 1993
Filed: June 29, 1993

Before McMILLIAN, JOHN R. GIBSON, and WOLLMAN, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

George Lombardi, William Armontrout, and Donald Cline appeal from the district court's[1] denial of their request for summary judgment on Missouri inmate Harvey Lucious Hall's

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[1] The Honorable Scott O. Wright, Senior United States District Judge for the Western District of Missouri.

42 U.S.C. § 1983 (1988) suit. Hall claims that the appellants violated his Fourteenth and Eighth Amendment rights by failing to release him from the Missouri State Penitentiary's Special Management Facility after he had been approved for reassignment to the general population's Protective Custody Unit. The appellants argue that they are entitled to summary judgment based on qualified immunity. Armontrout and Lombardi also contend that they are entitled to summary judgment because they did not have personal knowledge of and were not involved in Hall's continued confinement. We affirm the judgment of the district court.

In June 1987, Hall was transferred to Level I of the Special Management Facility[2] for possessing dangerous contraband. The Classification Committee reviewed Hall's placement later that same month and moved him to Level II. In September 1987, the Committee transferred Hall to Level III, and in December 1987, the Committee recommended that Hall be released to the general population's Protective Custody Unit. Although the Warden's designee approved the Committee's recommendation, Hall was not reassigned. The Committee reviewed Hall's status again on four different occasions during 1988 and each time recommended that he be released from the Special Management Facility. The recommendations were always approved, but Hall was not released. In February 1989, Hall committed another conduct violation, the Classification Committee recommended that Hall be reclassified for Level I housing in the Special Management Facility, and the recommendation was approved. Hall worked his way through the Special Management Facility levels again, and in June 1989, the Committee's recommendation that Hall be assigned to an "acceptable level"

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[2] The Special Management Facility serves as the behavior modification and administrative segregation unit of the Missouri State Penitentiary. The Special Management Facility consists of three housing units—Levels I through III—which are progressively less restrictive.

was approved. In August 1989, the Committee again recommended that Hall be released, the recommendation was approved, and Hall was finally reassigned to the Protective Custody Unit.

Hall filed suit, claiming that the appellants violated his Fourteenth and Eighth Amendment rights by failing to release him after the recommendations for release had been approved. The appellants request summary judgment, arguing that Hall did not have a constitutional right to be transferred, that Hall received procedural due process, that other inmates who were moved before Hall were different, that the Special Management Facility conditions were not cruel and unusual, and that qualified immunity applied.

The district court referred the case to a magistrate judge,[3] who recommended that the appellants' request for summary judgment be denied. *Hall v. Lombardi*, No. 89-4221-CV-C-5, Slip op. at 8 (W.D. Mo. Feb. 13, 1992) (Magistrate's Report and Recommendations). The magistrate judge found that Hall "spent approximately fourteen months in the Special Management Facility after he was approved for release in December, 1987, and approximately two months in the Special Management Facility after he was approved for release in June, 1989." *Id.* at 4. The magistrate judge rejected the appellants' arguments regarding qualified immunity because, although Hall had received procedural protection regarding his housing assignment, "the failure to release [Hall] from administrative segregation and retransfer him to protective custody was an arbitrary failure to restore the measure of liberty to which [Hall] was entitled—a substantive right." *Id.* at 6-7. The magistrate judge determined that Hall had a liberty interest in being released from the Special Management Facility, and stated that "any reasonable person

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[3] The Honorable William Knox, United States Magistrate Judge for the Western District of Missouri. *See* 28 U.S.C. § 636 (1988).

should know that neglecting [Hall] for seventeen months may well be in violation of his rights." *Id.* at 7. The magistrate judge examined the appellants' reasons for keeping Hall in the Special Management Facility and concluded that a material issue of fact existed, namely, whether the appellants arbitrarily had deprived Hall of his liberty interest keeping him in the Special Management Facility for such a long period of time after he was approved for release. *Id.* at 7-8. The district court adopted the magistrate judge's recommendations and denied the motion for summary judgment. *Hall v. Lombardi*, No. 89-4221-CV-C-5 (W.D. Mo. June 11, 1992). Lombardi, Armontrout, and Cline appealed.

I.

The appellants argue that the district court erred in denying their motion for summary judgment based on qualified immunity.

A denial of a motion for summary judgment is not a final judgment, and therefore, is not usually appealable. *See Wright v. South Ark. Regional Health Ctr.*, 800 F.2d 199, 202 (8th Cir. 1986). A denial of summary judgment on the basis of qualified immunity, however, is an exception to the general rule, and we have held that when there is a closely related question of law, we will consider the merits of the appeal. *Drake v. Scott*, 812 F.2d 395, 398-99 (8th Cir.), *cert. denied*, 484 U.S. 965 (1987); *see also Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Johnson v. Hay*, 931 F.2d 456, 459-60 (8th Cir. 1991); *Wright*, 800 F.2d at 202.

We review the district court's denial of summary judgment under the same standard as the district court applied to the motion. A party is entitled to summary judgment only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We view the evidence in the light most favorable to Hall, the nonmovant, and give him the benefit of all

reasonable inferences. *Johnson*, 931 F.2d at 460. In addition, qualified immunity is an affirmative defense which the appellants have the burden of proving. *Slone v. Herman*, 983 F.2d 107, 109 (8th Cir. 1993).

Prison officials may generally rely on the defense of qualified immunity to protect them from liability for civil damages. *Brown v. Frey*, 889 F.2d 159, 165 (8th Cir. 1989), *cert. denied*, 493 U.S. 1088 (1990). In determining whether the appellants are protected by qualified immunity, we must first decide "the essentially legal question whether the conduct of which [Hall] complains violated clearly established law," and then we must decide whether Hall adequately alleged the commission of such acts. *Mitchell*, 472 U.S. at 526; *Johnson*, 931 F.2d at 460. The test "focuses on the objective legal reasonableness of an official's acts," and the qualified immunity defense fails if the official violates a clearly established right because "a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

A.

In *Knight v. Armontrout*, 878 F.2d 1093, 1095 (8th Cir. 1989), we held that Missouri State Penitentiary Regulation 20-212.040 creates a "protectible liberty interest." We did not decide *Knight*, however, until about the time Hall was released from the Special Management Facility. The appellants therefore contend that even if Hall had a substantive due process right to be removed from the Special Management Facility, it was not "clearly established." The appellants argue that if neither the Supreme Court nor this Court has decided a factually and legally similar case, the right is rarely considered "clearly established." The appellants then point out that the district court did not cite any Supreme Court or Eighth Circuit authority in support of its conclusions.

Apparently believing that the law regarding Hall's liberty interest was not clearly established, the magistrate judge determined that "[d]efendants are not entitled to qualified immunity for actions which are arbitrary and capricious." Slip op. at 6. Relying on *Childs v. Pellegrin*, 822 F.2d 1382 (6th Cir. 1987), the magistrate judge determined that the facts in this case suggested that the appellants' failure to release Hall was "an *arbitrary* failure to restore the measure of liberty to which plaintiff was entitled—a substantive right." Slip op. at 6-7 (emphasis added). The magistrate judge examined the appellants' reasons for Hall's prolonged confinement, and concluded that a material issue of fact existed as to whether the appellants had "arbitrarily" deprived Hall of a constitutionally protected liberty interest. *Id.* at 8.

As the appellants point out, "[w]e have yet to decide whether substantive due process provides a right to be free from arbitrary and capricious state action." *See Weimer v. Amen*, 870 F.2d 1400, 1405 (8th Cir. 1989). We, however, need not decide this question here because we conclude that the law was clearly established at the time of Hall's prolonged detention.[4]

To demonstrate that the law is "clearly established," there must be a showing that a "reasonable official would understand that what he is doing violate[s]" plaintiff's rights. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). A government official is not required to guess, at his peril, the future development of constitutional doctrine, *see Mitchell*, 472 U.S. at 535 n.12, nor is

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[4] We note that keeping an inmate in the Special Management Facility for sixteen to seventeen months after that inmate has been repeatedly approved for release appears to be the type of arbitrary and capricious activity that might warrant such a holding—it seems abusive, shocks our conscience, and offends our judicial notions of fairness. *See Weimer*, 870 F.2d at 1405 (stating that "the cornerstone of due process is the prevention of abusive governmental power," and to violate substantive due process, the conduct must "shock the conscience or otherwise offend our judicial notions of fairness").

a government official liable for a "violation of extremely abstract rights." *Anderson*, 483 U.S. at 639. This is not to say, however, that an official is protected by qualified immunity unless the very action in question has been held unlawful. *Id.* at 640. We have taken a broad view of what constitutes "clearly established law" for the purpose of qualified immunity, requiring some but not precise factual correspondence with precedents and demanding that officials apply "general, well-developed legal principles." *Boswell v. Sherburne County*, 849 F.2d 1117, 1121 (8th Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989); *Lappe v. Loeffelholz*, 815 F.2d 1173, 1177 (8th Cir. 1987). It is only necessary that the unlawfulness of the official's act is apparent in view of pre-existing law. *Coffman v. Trickey*, 884 F.2d 1057, 1063 (8th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990); *see also Johnson*, 931 F.2d 460-61.

We believe that in this case a reasonable official would have understood that he was violating Hall's rights. *See Anderson*, 483 U.S. at 640. Although we did not specifically hold that the prison regulations created a liberty interest until 1989, our decision in *Knight* was predictable. There are many Supreme Court and Eighth Circuit cases that support the "general, well-developed legal principle" that regulations which contain "particularized substantive standards or criteria that guide the exercise of discretion by penitentiary officials" create a protectible liberty interest. *Clark v. Brewer*, 776 F.2d 226, 230 (8th Cir. 1985); *see also, e.g., Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 11-12 (1979); *Vitek v. Jones*, 445 U.S. 480, 488-90 (1980); *Green v. Black*, 755 F.2d 687, 688 (8th Cir. 1985); *Parker v. Corrothers*, 750 F.2d 653, 660-61 (8th Cir. 1984); *Williams v. Missouri Bd. of Probation and Parole*, 661 F.2d 697, 698 (8th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982); *Evans v. Dillahunty*, 662 F.2d 522, 525 (8th Cir. 1981); *Wright v. Enomoto*, 462 F. Supp. 397, 402-03 (N.D. Cal. 1976), *summarily aff'd*, 434 U.S. 1052 (1978). Moreover, when these

regulations contain language of a mandatory nature (shall, will, must), they are interpreted as creating a protectible liberty interest. *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983); *Greenholtz*, 442 U.S. at 11-12; *Clark*, 776 F.2d at 230; *Parker*, 750 F.2d at 660-61; *Williams*, 661 F.2d at 698; *Evans*, 662 F.2d at 525; *Wright*, 462 F. Supp. at 402-03.

The prison regulation at issue here provides:

> (11) RELEASE FROM THE SPECIAL MANAGEMENT FACILITY: Most inmates assigned to the Special Management Facility will work toward release from the facility to the general population. This will be accomplished by demonstrating progressively more positive and responsible behavior, as he is promoted through the level system.
>
> > (A) Influencing Factors: The primary performance objectives will be satisfactory work and training evaluations, demonstrated positive attitude and conduct, and meaningful participation in available self-improvement activities.
> >
> > (B) Actual Release: An inmate's release to the general population will be accomplished by being promoted from Level I through Level II to Level III as a result of positive reviews by the Special Management Facility Classification Committee and the inmate's Unit Classification Treatment Team. A significant period of continuing and progressively more responsible behavior in Level III will be required for the Special Management Facility Classification Committee to recommend and the Warden or designee to approve release to the general population.

Regulation 20-212.040(11)(A), (B). When determining whether an inmate has "accomplished" release from the Special Management Facility, the prison officials must review the influencing

factors to see if "[a] significant period of continuing and progressively more responsible behavior in Level III" has been achieved. *Id.* This finding is "required" before a recommendation for release may be made or approved. *Id.* The language tells "most" inmates that release "*will* be accomplished" once the criteria have been met. *Id.* (emphasis added). Hall met all of these criteria, the Classification Committee recommended his release many times, and the recommendations were approved each time. Nevertheless, Hall spent an additional sixteen to seventeen months in the Special Management Facility.

Any reasonable official would understand that once Hall obtained final approval for release, he had a legitimate expectation of being released in a reasonable amount of time, and that failing to meet that expectation for such a long time violated Hall's rights. The unlawfulness of the prison officials' action is apparent in view of pre-existing law. The right is not abstract, and the situation did not require the officials to guess about the future development of constitutional doctrine. Although the prison officials followed the general procedure in recommending and approving release many times, they withheld the end result of that procedure—release.

We recognize that the regulations say "most," not all, inmates will work toward release from the Special Management Facility. Hall did not fall into the category of inmates who could not work toward release as he had already worked his way toward release, met all the requirements, and even obtained final approval. Similarly, we reject the appellants' argument that Hall fell within the listed exceptions to the general release rule. *See* Regulation 20-212.040(11)(C).[5] We agree with the magistrate judge's

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[5] Regulation 20-212.040(11)(C) provides:

> ... Exceptions: There will be some inmates assigned to the Special Management Facility who will not become eligible for release to ad-

(Footnote 5 continued on next page)

determination that the exceptions expressly apply to an inmate's eligibility for a recommendation of release or approval of that recommendation, not to inmates like Hall who have been through the entire process and received a recommendation which was approved. Moreover, each exception requires a specific directive from the Warden, and we find no evidence in the record before us of such a directive regarding Hall.[6]

The appellants also argue that in light of our decision in *Williams v. Armontrout*, 852 F.2d 377, 378-79 (8th Cir.), *cert. denied*, 488 U.S. 996 (1988), the law in this area was not clearly established. In *Williams*, an inmate alleged that prison officials had violated his constitutional rights by consistently recommending that he remain at Level I—the most restrictive level in the Special Management Facility. *Id.* We held that the Missouri prison regulations at issue did not create a liberty interest because they did not contain substantive criteria for the committee to use when deciding whether a prisoner should be reclassified within the Special Management Facility. *Id.* There is a significant different, however, in the language of the regulations in *Williams* and the language here. The regulations in *Williams* merely defined "the role of the Division to following procedures which will result in the prompt return of the inmate to the general population when the security of the institution and inmate

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(Footnote 5 continued)

> general population due to administrative reasons which may include security considerations, the inmate's personal safety, or other considerations, the inmate's personal safety, or other related correctional management concerns. Such inmates may progress as far in the Special Management Facility level system as their particular circumstances will permit. Decisions in these cases will consist of specific directives from the Warden.

[6] In fact, on appeal, Warden Armontrout argues that he did not have personal knowledge of or involvement in Hall's situation.

permits," set forth the Classification Committee's duties, and provided for periodic inmate reviews. *Id.* Nothing limited the officials' discretion in determining when an inmate should be moved within the Special Management Facility. To the contrary, the regulations before us specifically mandate that certain factors be considered and that specific requirements be met before an inmate can "accomplish" release. Once these have been met, including receipt of a recommendation and final approval, the inmate has a legitimate expectation that he will be released in a reasonable amount of time.[7] In addition, the prison officials must have been aware of the general, well-developed test for deciding when a regulation creates a liberty interest because we set out those requirements in *Williams*, 852 F.2d at 379.

The appellants also argue that this case is substantially similar to *Sanders v. Woodruff*, 908 F.2d 310 (8th Cir.), *cert. denied*, 498 U.S. 987 (1990). In *Sanders*, an inmate claimed that the prison officials violated his due process rights when they moved him within the Special Management Facility from a less restrictive Level II assignment to Level I. *Id.* at 313. We held that the liberty interest identified in *Knight*, in which the inmates complained of being moved into punitive detention and being detained after they were approved for release, was not applicable because the inmate in *Sanders* was already in administrative segregation and

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[7] At oral argument, the appellants asked us to specific exactly what amount of time is reasonable. We will not give an advisory opinion. Although there is no static test for determining how long a prisoner's confinement may continue before his rights are implicated, common sense is helpful. *See Howard v. Adkinson*, 887 F.2d 134, 140 (8th Cir. 1989). Certainly, as we held in *Knight*, when the inmates received substantially the same privileges they would have received if they had been transferred, a thirteen-day delay due to a shortage of beds was not unreasonable. 878 F.2d at 1095. A transfer out of the Special Management Facility and a sixteen to seventeen month delay, on the other hand, stands in stark contrast.

was complaining only about movement within the Facility. *Id.* We also held that the inmate in *Sanders* had received all the process that was due under the regulations. *Id.* Here, Hall is not complaining about being moved from one Level to another within the Special Management Facility. Instead, Hall objects to his continued confinement after he obtained final approval for a complete release. In addition, the Warden in *Sanders* specifically directed the inmate's reassignment and the Classification Committee agreed. *Id.* at 312. Here, the Classification Committee repeatedly recommended Hall's release and the Warden's designee gave final approval each time.

Finally, rely on on *Weimer*, 370 F.2d at 1405-06, the appellants contend that Hall's substantive due process rights are no greater than his procedural rights, and therefore, because the magistrate judge found that Hall's procedural rights were not violated, Hall's substantive rights were not violated. This argument misses the point. Although substantive rights may not be greater than procedural rights, they are not identical. Hall had the right to have the procedure followed and had a legitimate expectation that once the specified requirements were met, the promised result would occur. Hall may not have the right to receive a recommendation of release or to have a recommendation approved, but once the recommendation and final approval were both given, he had an interest in being released within a reasonable time period.

We conclude that "general, well-established legal principles," so evident that they would be confirmed by general common sense, would have alerted a reasonable prison official to the fact that Hall's rights were being violated by the extended delay.

B.

The appellants also argue that Hall has not alleged sufficient facts to demonstrate that the appellants violated his rights. For

many of the same reasons discussed in Part A, we reject this argument.

More specifically, the appellants contend that there were legitimate reasons for keeping Hall in the Special Management Facility, and that they did not act intentionally. Hall, however, disputes the appellants' claimed reasons and points to other inmates who were approved for release after he was, but released before him. Moreover, as the appellants conceded at oral argument, a dispute exists with regard to the differences between the privileges and conditions of the Special Management Facility and the Protective Custody Unit.

Given the extended delay and the factual disputes, we conclude that a material issue of fact exists as to whether Hall was deprived of a constitutionally protected liberty interest by the prison officials failure to release him from the Special Management Facility once he had been approved for release. The district court did not err in refusing to grant the appellants' motion for summary judgment.

II.

Appellants Armontrout and Lombardi argue that the district court should have granted their request for summary judgment because they had no personal knowledge of or involvement in the failure to release Hall. Armontrout and Lombardi contend that they were only sued because they were within the "chain of command;" therefore, as no respondeat superior liability exists under section 1983, they cannot be held liable.

Although Armontrout and Lombardi may not be liable under a respondeat superior theory, proof of actual knowledge is not an absolute prerequisite for imposing supervisory liability. *See Howard*, 887 F.2d at 138. We have "consistently held that reckless disregard on the part of a supervisor will suffice to impose liability." *Id.*; *see also Martin v. White*, 742 F.2d 469,

474 (8th Cir. 1984); *Miller v. Solem*, 728 F.2d 1020, 1024-25 (8th Cir.), *cert. denied*, 469 U.S. 841 (1984).

Viewing the evidence in the light most favorable to Hall, we cannot say that a factual dispute does not exist. Prison regulation 212.0404(9)(A) requires Cline to report to Armontrout the names of all inmates assigned to the Special Management Facility, the reason for assignment, and the length of time assigned. If an inmate has been assigned to the Special Management Facility for more than one year, Armontrout or his representative must personally review the inmate's file and determine, in writing, whether the prisoner will be retained in the Special Management Facility. Regulation 212.040(9)(C). If the inmate is retained "for an additional year or years," Armontrout must send a report to Lombardi for review and advice. *Id.* Thus, their compliance or noncompliance with these regulations may establish actual knowledge or reckless disregard.

Lombardi and Armontrout argue that because the magistrate judge found no procedural due process violation, the retention regulation is irrelevant to this situation. We, however, are not looking to these regulations to establish a possible procedural violation. Instead, these regulations are relevant in the context of linking Lombardi and Armontrout to Hall's situation. Whether they actually knew or should have known of Hall's status and acted or failed to act in such a way that would cause them to be liable is for the jury to decide.

We affirm the district court's decision to deny the appellants' motion for summary judgment.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 89-4221-CV-C-5

HARVEY LUCIOUS HALL,
Plaintiff,

v.

GEORGE A. LOMBARDI, et al.,
Defendants.

ORDER

By report of February 13, 1992, the United States Magistrate Judge to whom this cause has been referred recommended denial of plaintiff's and defendants' motions for summary judgment. The parties were advised they could file written exceptions to the recommendation, pursuant to 28 U.S.C. § 636(b)(1)(C). A conference was held on February 28, 1992, and the parties were given the opportunity to file affidavits in support of their positions. Affidavits have now been filed.

On March 18, 1992, defendants filed a motion to strike certain portions of plaintiff's affidavit. Plaintiff responded in opposition thereto. Defendants' motion will be denied. In considering the affidavits submitted by the parties, the court relies on only those portions which are or appear to be within the knowledge of the affiant, and constitute admissible evidence.

A *de novo* review of the record[1] in this cause, including the exceptions filed by defendants on February 24, 1992, and the

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[1] Court proceedings, if any, are recorded by electronic recording equipment and the tapes are available for review by the court and counsel.

affidavits submitted by the parties on March 3 and 6, 1992, convinces the court that the recommendation of the Magistrate Judge is correct in all respects and should be adopted. There exist genuine issues of material fact for trial.

IT IS, THEREFORE, ORDERED that the parties' motion for summary judgment should be and they are hereby denied. [73, 78] It is further

ORDERED that defendants' motion of March 18, 1992, to strike certain portions of plaintiff's affidavit is denied. [124]

/s/ SCOTT O. WRIGHT
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No. 89-4221-CV-C-5

HARVEY LUCIOUS HALL,
Plaintiff,

v.

GEORGE A. LOMBARDI, et al.,
Defendants.

REPORT AND RECOMMENDATION

Plaintiff, an inmate confined in a Missouri penal institution, commenced this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and its corresponding jurisdictional statute, 28 U.S.C. § 1343. Following the filing of this cause, it was referred to the undersigned United States Magistrate Judge for processing in accord with the Magistrate Act, 28 U.S.C. § 636, and W.D. Mo. R. 22.

Pending before the court are the parties' cross-motions for summary judgment. Responses and replies have been filed and the motions are now fully submitted.

Statement of Claims

Plaintiff alleges in his original complaint against defendants Lombardi, Armontrout and Cline that he was assigned to the Special Management Facility on or about June 23, 1987. Plaintiff states he completed his time in the Special Management Facility satisfactorily and on September 17, 1987, was recommended for assignment to another, less restrictive housing unit. Plaintiff asserts the recommendation was approved by defendant Armontrout, but plaintiff was not reassigned for seventeen months. As a result, plaintiff was denied privileges which he

would have been permitted in the less restrictive housing unit for which he had been approved.

Plaintiff also alleges other inmates, who were approved for release from the Special Management Facility after plaintiff was approved for release, were actually released prior to plaintiff. Thus, plaintiff alleges he was denied equal protection and was subjected to discrimination.

Summary Judgment Standards

Fed. R. Civ. P. 56(c) requires "the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The burden on the party moving for summary judgment "is only to demonstrate . . . that the record does not disclose a genuine dispute on a material fact." *City of Mt. Pleasant, Iowa v. Associated Elec. Co-Op.*, 838 F.2d 268, 273 (8th Cir. 1988).

Once the moving party has done so, the burden shifts to the nonmoving party to go beyond his pleadings and show, by affidavit or by "depositions, answers to interrogatories, and admissions on file," that there is a genuine issue of fact to be resolved at trial. *Celotex*, 477 U.S. at 323. Evidence of a disputed factual issue which is merely colorable or not significantly probative, however, will not prevent entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Summary judgment, however, "is an extreme remedy, to be granted only if no genuine issue exists as to any material fact." *Hass v. Weiner*, 765 F.2d 123, 124 (8th Cir. 1985). In ruling on a motion for summary judgment, this court must view all facts in a light most favorable to the nonmoving party, and that party must receive the benefit of all reasonable inferences drawn from

the facts. *Robinson v. Monaghan*, 864 F.2d 622, 624 (8th Cir. 1989).

If "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law," the court must grant summary judgment. Fed. R. Civ. P. 56(c).

Findings of Fact and Conclusions of Law

The basic facts of this case are not in dispute. Plaintiff was placed in the Special Management Facility on June 17, 1987, because two weapons were found in his cell and he posed a threat to the security and safety of the institution. Plaintiff received a conduct violation on June 17, 1987, for Rule 3, dangerous contraband. Plaintiff was found guilty of the conduct violation by the Adjustment Board on June 19, 1987, and was referred to the Special Management Facility Classification Committee. Plaintiff does not challenge in this lawsuit the process he received relative to the conduct violation or his initial placement and assignment into the Special Management Facility.

Instead, plaintiff challenges his nonrelease from the Special Management Facility after he had been approved for release. Plaintiff's initial placement in administrative segregation was reviewed on June 22, 1987, and his placement continued. On June 23, 1987, the Classification Committee assigned plaintiff to the Special Management Facility, Level II, and scheduled a review to be held in ninety days. Plaintiff was recommended for transfer to Level III at the 90-day review held on September 16, 1987. Subsequently, on December 15, 1987, plaintiff's status was reviewed and it was recommended that he be released from the Special Management Facility and assigned to the Protective Custody Unit. The recommendation was approved.

Plaintiff was not released from the Special Management Facility, however, and thus received additional reviews on March 14, June 13, September 12, and December 11, 1988. At

each review, a transfer from the Special Management Facility to the Protective Custody Unit was recommended and approved.

In February, 1989, plaintiff received a conduct violation for dangerous contraband and was placed in Level I of the Special Management Facility. Approximately thirty days later, plaintiff's placement was reviewed and he was transferred to Level II. On June 21, 1989, plaintiff's placement was reviewed and he was recommended and approved for transfer to an acceptable level.

In August, 1989, plaintiff received a conduct violation and received ten days in Unity 5-A detention. During July and August, 1989, the Special Management Facility was reorganized and former Units 5-A (Level II) and 5-B (Level III) were changed to protective custody cells. In August, 1989, plaintiff was assigned to 5-A, protective custody. At that time, Unit 5-A was no longer part of the Special Management Facility.

Summarily, it appears plaintiff was approved for release from the Special Management Facility to the protective custody unit on December 15, 1987. Plaintiff was not placed into the protective custody unit until August, 1989. Between February and June, 1989, plaintiff was classified for and housed in the Special Management Facility because of his conduct. Therefore, plaintiff spent approximately fourteen months in the Special Management Facility after he was approved for release in December, 1987, and approximately two months in the Special Management Facility after he was approved for release in June, 1989.

Defendants assert they are entitled to judgment as a matter of law because (1) plaintiff had no constitutional right to be transferred to a lesser restrictive unit or out of the Special Management Facility, (2) even if plaintiff had a liberty interest in release, he received all the required procedural due process protections, (3) plaintiff was not similarly situated with other inmates who were moved out of the unit prior to plaintiff, (4) the conditions

in the Special Management Facility were not cruel and unusual, and (5) defendants are entitled to qualified immunity.

Plaintiff moves for summary judgment on the grounds that defendants admitted plaintiff should not be in administrative segregation and that other inmates were assigned after and released from administrative segregation before plaintiff for equal or lesser rule infractions. Plaintiff asserts he was denied due process, equal protection and was subjected to discrimination.

Administrative segregation "involves the exercise of administrative judgment in determining whether an inmate should be segregated from the general population and predicting what he will probably do or have done to him if he is permitted to remain in population or to return to population after a period of segregation." *Kelly v. Brewer*, 525 F.2d 394, 400 (8th Cir. 1975). "[I]t maybe used to protect the prisoner's safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer." *Hewitt v. Helms*, 459 U.S. 460 (1983). Under these circumstances, only an informal, nonadversarial review of the information supporting the transfer is required to satisfy due process. *Id.*, 459 U.S. at 469. Here, it is clear plaintiff received periodic reviews of his housing assignment within the administrative segregation unit. Thus, plaintiff received procedural protections regarding his housing assignment and was approved for release.

Defendants also assert plaintiff had no constitutional right to release from administrative segregation, even though approved for release. Absent some legitimate expectancy founded in state law, regulation or policy, a convicted person has no constitutional right to be confined in any particular correctional institution or unit within a correctional institution. *Olim v. Wakinekona*, 462 U.S. 238 (1983); *Meachum v. Fano*, 427 U.S. 25 (1967);

Monrayne v. Haymes, 427 U.S. 236 (1976); *Williams v. Walls*, 744 F.2d 1345 (8th Cir. 1984). Defendants argue that at the time plaintiff was housed in administrative segregation, state regulations and policies had not been determined to create a liberty interest relative to placement in or release from administrative segregation. *See Williams v. Armontrout*, 852 F.2d 377 (8th Cir. 1988). About the time of plaintiff's release, *Knight v. Armontrout*, 878 F.2d 1093 (8th Cir. 1989) was decided. *Knight* held that the regulations relating to placement of inmates from the general population into administrative segregation created a protectible liberty interest.

Therefore, defendants assert that even if plaintiff had a protectible liberty interest in release from the Special Management Facility, defendants are entitled to qualified immunity because the law was not clearly established. The question of whether defendants are entitled to qualified immunity is a question of law to be determined by the trial court. *McIntosh v. Arkansas Republican Party*, 816 F.2d 409 (8th Cir. 1987); *Warren v. City of Lincoln*, 816 F.2d 1254 (8th Cir. 1987). In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court established an objective test to determine if the official is entitled to qualified immunity. That qualified immunity is available if the law as it relates to the relevant facts is not clearly established and if a reasonable official could have believed the alleged conduct was lawful. As recently stated in *Powers v. Lightner*, 820 F.2d 818, 821 (7th Cir. 1987),

> [t]he standard that the federal officials must meet is an objective one. It is irrelevant whether either defendant knew at the time he acted or failed to act that his actions violated someone's constitutional rights. *Kompare v. Stein*, 801 F.2d 883, 887 (7th Cir. 1986); *Bates v. Jean*, 745 F.2d 1146, 1151 (7th Cir. 1984). Until a particular constitutional right has been stated so that reasonably competent officers would agree on its application to a given set of facts, it has

> not been "clearly established" for purposes of *Harlow*. (Citations omitted.)

Once a court determines as a matter of law that a legal standard governing the governmental action at issue is clearly established as to the relevant facts, there is no qualified immunity. *Anderson v. Creighton*, 483 U.S. 635 (1987). The factual question whether the official engaged in the specific conduct in violation of the established constitutional standard is to be resolved by the jury at trial. *See Davis v. Scherer*, 468 U.S. 183 (1984); *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The question of whether the law is clearly established is not to be determined in the abstract, however. It must be established that the law is clear in relation to the specific conduct involved so that a reasonable official would understand that what he is doing violates the individual's rights. *Anderson v. Creighton*.

If the court defers to defendants' statement of the issue, they may be entitled to qualified immunity.[1] Nevertheless, "[t]he touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Defendants are not entitled to qualified immunity for actions which are arbitrary and capricious. The facts of this case suggest that the failure to release plaintiff from administrative segregation and retransfer him to protective custody was an arbitrary failure to restore the measure of liberty to which plaintiff was entitled—a substantive right. *See Childs v. Pellegrin*, 822 F.2d 1382, 1389 (6th Cir. 1987). The decisions that plaintiff was ready for transfer, made on a number of occasions during the seventeen months he was held, surely create an expectation of release within a reasonable time. Statis-

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[1] The court notes the regulations cited in *Knight* do not specifically relate to actual release from administrative segregation, but relate to placement into administrative segregation and movement though the faculty.

tically, a custom or practice may be established from the practice of transferring others. Plaintiff had a liberty interest in release—and any reasonable person should know that neglecting plaintiff for seventeen months may well be in violation of his rights. A court decision was not necessary to establish that this was wrong.

Defendants do not dispute plaintiff was approved for release from administrative segregation. The Special Management Facility was a behavior modification unit with regulations relating to movement through the levels of the unit based on behavior. The appropriate classification or reviewing committees repeatedly reviewed plaintiff's assignment in the unit and determined he was ready for release from the unit. When plaintiff was not released, he notified the defendants who had ultimate authority over the institution and who could have presumably made arrangements to have plaintiff transferred. Other regulations indicate plaintiff's continued housing assignment within the unit should have been reported to defendants through institutional procedures. At some point during the year and a half after plaintiff's approval for release, defendants should have known plaintiff had a substantive right to release from the Special Management Facility.[2]

The records also indicate plaintiff was told he was not released because of overcrowded conditions. Nevertheless, other inmates who appear to have been approved for release subsequent to plaintiff were released prior to plaintiff. Defendants assert that a cell did not become available which met plaintiff's security needs, but do not state any steps were taken to find a suitable cell

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[2] Defendants' argument that pursuant to Rule 212.040.10(11)(c), plaintiff fell within the exception to actual release is not persuasive. The exception specifically states "[t]here will be some inmates assigned to the Special Management Facility who will not become eligible for release . . .." Plaintiff does not fit into this exception because he was eligible for release and was approved for release.

and do not state why the cells which became available were suitable for other protective custody inmates but not plaintiff. The failure to move plaintiff may have been motivated by factors other than overcrowding. The court is not required to accept defendants' conclusive statements of why plaintiff was not moved. Plaintiff should have the opportunity to present the facts to a jury and have the jury decide what defendants' motivation was. Maybe it was legitimate, maybe neglect, and maybe it was with deliberate indifference to plaintiff's right to be transferred out of administrative segregation. That is for the jury.

Thus, it will be recommended that the motions for summary judgment be denied because there exists a material issue of fact as to whether plaintiff was deprived of a constitutionally protected liberty interest arbitrarily by defendants who did not take steps to transfer plaintiff out of the Special Management Facility for such a long period of time after plaintiff was approved for release from that facility.

Based on the foregoing and pursuant to the provisions of 28 U.S.C. § 636, it is hereby

RECOMMENDED that the parties' motions for summary judgment be denied for the reasons set forth above.

Under 28 U.S.C. § 636(b)(1), the parties may make specific written exceptions to any or all of the foregoing recommendations within ten (10) days of their receipt thereof. If additional time is needed to file exceptions, a motion requesting such time should be filed within said ten days, giving the reasons for the request. *See Nettles v. Wainwright*, 656 F.2d 986 (5th Cir. 1981); *Messimer v. Lockhart*, 702 F.2d 729 (8th Cir. 1983); *Thomas v. Arn*, 474 U.S. 140 (1985); *Nash v. Black*, 781 F.2d 665 (8th Cir. 1986). The parties are advised that failure to make specific written exceptions to the Report and Recommendation may result in a waiver of their right to appeal.

Dated this 13 day of February, 1992.

/s/ WILLIAM A. KNOX
United States Magistrate Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2543WMJC

Harvey Lucious Hall,
Appellee,

vs.

George Lombardi, et al.,
Appellants.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

August 11, 1993

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX D

JCCC INSTITUTIONAL RULE

SECTION 212.040.14

(7) PLACEMENT AND ASSIGNMENT:

(A) . . .

(B) Permanent Assignments: The Special Management Facility Classification Committee shall recommend whether an inmate should be classified to the Special Management Facility. In making such arrangements and recommendations, the Classification Committee shall consider the immediate conduct and prior behavioral history of the inmate, *as well as any other salient reasons for initial placement in administrative segregation (material witness, etc.)*

1. The Classification Committee has the option of recommending assignment to Level I or Level II depending on the committee's assessment of that particular inmate's security and behavioral needs.

assignment recommendations will be reviewed and approved or modified by the Deputy Warden.

(8) . . .

(11) *RELEASE FROM THE SPECIAL MANAGEMENT FACILITY: Most inmates assigned to the Special Management Facility will work toward release from the facility to the general population. This will be accomplished by demonstrating progressively more positive and responsible behavior, as he is promoted through the level system.*

(A) *Influencing Factors: The primary performance objectives will be satisfactory work and training evaluations, demonstrated positive attitude and conduct, and meaningful participation in available self-improvement activities.*

(B) *Actual Release: An inmate's release to the general population will be accomplished by being promoted from Level I through Level II to Level III as a result of positive reviews by the Special Management Classification Committee and the inmate's Unit Classification Treatment Team. A significant period of continuing and progressively more responsible behavior in Level III will be required for the Special Management Facility Classification Committee to recommend and the Warden or designee to approve release to the general population.*

(C) *Exceptions: There will be some inmates assigned to the Special Management Facility who will not become eligible for release to general population due to administrative reasons which may include security considerations, the inmate's personal safety, or other related correctional management concerns. Such inmates may progress as far in the Special Management Facility level system as their particular circumstances will permit. Decisions in these cases will consist of specific directives from the Warden.*

REVISED STATUTES OF MISSOURI

217.335. Classification teams, established appointment, qualifications, duties.—1. There shall be established at each correctional facility classification teams to be composed of the offender, along with a minimum of three members and a maximum of five members appointed as per policy.

2. It shall be the responsibility of the classification team to:

(1) Receive the report and recommendation of the reception and diagnostic center;

(2) Make recommendations to the chief administrative officer concerning custodial care, work assignments, education or vocational training and other treatment procedures for the offender;

(3) Make a continuing study of each offender concerning his behavior, capacities, adjustment and rehabilitation to determine his progress.

3. Offenders shall be assigned according to security and program needs as determined by a department-wide assessment system.

217.340. Classification of prisoner, factors to be considered.—The chief administrative officer of the institution shall classify the inmate by his job, labor, cell or sleeping quarters and level of security required, adhering as closely as possible to the recommendations of the classification team.